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IN THE SUPREME COURT OF THE

UNITED STATES

NO. _____

CENTRAL MACHINE & TOOL COMPANY, INC.

Petitioner

VERSUS

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR A WRIT OF CERTORARI
TO
THE UNITED STATES COURT OF
APPEALS
FOR THE TENTH CIRCUIT

Central Machine & Tool Company, Inc., of Enid, Oklahoma, your Petitioner, prays that a Writ of Certorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above and entitled matter (Circuit Court Case No. 543-69), on August 7, 1970.

OPINIONS BELOW

Reference is hereby made to the following opinions and the final Judgment as provided by Rule 23(a):

1. Decision of the Trial Examiner of the NLRB in Case 16-CA-3053, dated May 23, 1968.

2. Decision and Order of the National Labor Relations Board.

3. Opinion of the United States Court of Appeals, dated July 15, 1960, substantially affirming.

4. Judgment of the Circuit Court of Appeals for the Tenth Circuit substantially affirming, dated and filed August 7, 1970.

JURISDICTION

The date of the Judgment sought to be reviewed was entered and filed on August 7, 1970. The jurisdiction of this Court is envoked under the provisions of 28 USCA, Section 1254(1).

QUESTION PRESENTED

1. Whether or not this Petitioner as an employer can be forced by the NLRB to execute a contract with the Union, over its objections, which fails to contain certain provisions upon which this Petitioner insisted, to-wit:

> (1) That before any strike could be called by the Union during the tenure of the contract, and as the fourth step of the grievance procedure, it would first comply with and discharge its responsibilities to all of the members of the bargaining unit which it represents, by fairly presenting to all of such employees the question of whether or not a strike should be called; and that before a strike was determined that more than 50% of all the members in the bargaining unit should authorize such strike, and which provision embraces a very important "condition of employment".

STATEMENT

The Central Machine & Tool Company, Inc. operates a small machine shop in Enid, Oklahoma. In March of 1967, it sustained a devastating fire loss to its shop; and about a day later, an election was held under the auspices of the Regional Director of the NLRB, at which election the International Association of Machinists and Aerospace Workers, AFL-CIO, was selected by a small majority to represent all of the production and maintenance employees in the operation. These totaled about 36 people. Of these personnel in the bargaining unit, only slightly more than 50% were members of the Union, according to the vote.

After the Certification, negotiations with the Union commenced. Many sessions were held, and finally, subject to certain conditions which it

was felt could be agreed upon, a counter proposal was submitted by the employer to the Union.

There was one paragraph in the counter-proposal to which the Union strenuously objected, and on which it refused to further negotiate.

This was a sentence contained in the fourth step of the grievance procedure which provided that before a strike would be called, the proposal for a strike would be fairly submitted to all of the personnel, (and not confined merely to Union members), in the production and maintenance department, whom the Union was certified to represent.

This provision the Union adamantly refused, and thereupon filed the charge against this employer for "refusal to bargain" under Section 8(a)(5) of the National Labor Relations Act.

The Board upheld the position of the Union; and filed a Proceeding before the Circuit Court of

Appeals for the Tenth Circuit to force this employer to sign a contract excluding such provision.

The Court sustained the position of the Union, which results in this proceeding before the Supreme Court of the United States for a Writ of Certorari directing the Circuit Court of Appeals to reverse and rescind its Order, and Judgment, thereby removing the restraint which presently prevents this employer from negotiating a Contract which would protect the rights of its employees in the Bargaining Unit -- (and all of the component personnel of which, under the Act, the Union is required to represent, unrestricted and impartially, without regard to Union affiliation.)

ARGUMENT

The contention of this Petitioner is very simple, very brief, but very important.

To put it succinctly, your Petitioner believes that there is nothing in the National

Labor Relations Act which permits the Board to require an employer to sign a contract which is repugnant to its principles; and which fails to protect the rights of all of the employees in the Bargaining Unit.

Not only does the Act require the successful Union to represent all the employees, but during the hearing, the Union Representative himself emphasized the Union responsibility when Mr. Jim Wagner, the Union Representative, testified (A-408):

> Q. (By Mr. Carter) "What I asked the witness was, if he stated, 'If we can't have arbitration, we want to have the right to strike."
>
> A. "Yes Sir, I made that statement."
>
> Q. "Alright, so we discussed that. Do you remember when I asked who you represented, you said, 'We represent the plant out there, the employees in the plant out there"?
>
> A. "No sir, I said the Bargaining Unit."

Under these circumstances, it is difficult

to divine the mechanitions of the Union, with the concurrence of the Board and the approval of the Circuit Court, when it now attempts to say in substance:

> "But if we want to strike, we are not required to consult the members of the Bargaining Unit, whom we represent. The only people we have to confer with, and obtain approval of, are the members of the Union."

This line of reasoning, of course, is untenable and ridiculous. Perhaps it is a rhetorical question, but nevertheless, a most pertinent one:

> "How can the Board after it has certified the Union to represent all of the employees in the Bargaining Unit, equitably, legally, or successfully contend that Central Machine is bargaining in bad faith, when it insists, that before a strike is called, the Union must obtain the affirmative vote of at least a majority of those employees which the Board has designated the Union to represent?"

The position of the Union becomes even less defensible, in view of the fact that in its extreme effort to reach a contract with the Union, Central

Machine had agreed to include the Union's proposed "Maintenance Of Membership" clause in which it agreed to protect the integrity of Union membership.

In spite of its solemn obligation to represent all of the employees in the Plant, the Union apparently arrogates to itself, the right, only with the consent of slightly more than 1/4th of the employees, (the majority of the Union employees only) to call a strike and picket the plant, not only for a day, but for months, if it sees fit; and deprive all of the remaining 3/4ths of the employees of employment.

It was not this Petitioner, but the Union which refused to bargain on this point.

And yet, "wages, hours, and conditions of employment" constitute mandatory subject of discussion and bargaining.

Should the Court determine by some remote

possibility that the clause insisted upon by the Company was not a "mandatory issue" upon which bargaining must be held, then we must assert that it is an issue upon which bargaining is not precluded by the Act; and the Company was certainly bargaining in good faith when it insisted upon that clause.

It is to be noted, of course, that Counsel for the Board, in its Argument, and the Circuit Court in its Opinion, relied heavily upon the case of:

> "NLRB vs. Wooster Division of Borg-Warner Corporation, 356 U. S. 342, 349, 350 (1958)."

That case was decided by this Court approximately twelve (12) years ago, in a 5 to 4 decision.

Justice Burton delivered a well written opinion, which represented the majority thinking of the Court at that time, while Justice Harlan delivered and issued a extremely cogent and well

developed dissenting opinion which was concurred in by the eminent Justices, Frankfurter, Clark, and Whittaker.

In substance, the minority opinion held that the "ballot" clause did fall within the concept of "mandatory bargaining"; but that even if it were not included, then it was certainly not a clause which was prohibited from inclusion in the Bargaining negotiations; and that the Company should not be penalized by insisting upon its inclusion.

Cases cited in Justice Harlan's opinion were:

"Labor Board vs. National Maritime Union, 175 F2d 686."

"Medo Photo Supply Corporation vs. Labor Board, 321 US 678."

We are not criticizing or attacking the majority opinion written by Justice Burton, based upon conditions as they existed in 1958, because his opinion at that time, we feel was perhaps justified under conditions of Labor Relations as

then prevailed.

We do feel that the majority opinion was substantially tempered and softened by the dissenting opinion prepared by Justice Harlan; and that the close division of the Court, in that 5 to 4 decision, rendered it susceptible to subsequent attack, as the years have passed, and as this Petitioner is urging at this time.

The history of this Court, of course, graphically reveals that the doctrine of "Stare Decisis" is not nearly so sancrosant as it used to be.

And so, during the twelve (12) years which have expired since the "Borg-Warner" decision, there have been many erosions of the rules relating to mandatory and permissive bargaining, enunciated therein.

We feel this is right and proper, because there have been many changes in the application

of Labor Relations Law.

For instance, the Board in Allen Bradley Company vs. NLRB (Circuit Court of Appeals Seventh Circuit, 1961), 286 F2d 442, held that an employer had the right to insist upon a condition which would include in the Contract a provision to limit the right of the Union to discipline its own members for engaging in self-organizational activities, or refraining from such activities. The Court held that since the purpose of the clause was to permit employees to work during the strike, and the proposal related to "terms and conditions of employment" the clause was subject to mandatory bargaining and the Union obliged to bargain in good faith on that clause.

In this case, the Union apparently insists that we are invading their internal rights of determination, which certainly would involve "discipline"; and yet, the Seventh Circuit has held that

this was a proper and legal subject for "mandatory bargaining".

In addition thereto, since 1958, there have been further expansions of the clause "terms and conditions of employment." In many cases, which involve bonuses, insurance, profit-sharing plans, and other items which certainly are important, but not more important than the conditions to be imposed before a strike can be called, the Courts have approved.

As a matter of fact, without the necessity of citing specific cases, it has been held that a "Strike" and a "No-strike" clause are subjects of mandatory bargaining.

A more significant recent case is that decided by this Honorable Court on March 2, 1970, to-wit:

> "H. J. Porter Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent, being case No. 230 of this Court."

This case involved the right of an employer to refuse to include in a Contract a "check-off" clause.

Justice Black delivered the opinion of this Court, Justice White and Justice Marshall did not participate in the consideration or decision of the case. Justice Harlan concurred. Justice Douglas and Justice Stuart dissented.

The opinion of Justice Black and the concurring Justices is exhaustive and cogent. It recites the legislative history of the Labor Relations Act.

The majority opinion cites numerous cases sustaining its decision; but particularly relies upon that provision in Section 8(b) which requires collective bargaining between the parties, but further contains the very definite provision with reference to the obligation to negotiate as follows:

> "But such obligation does not compel either party to agree to a proposal or require the making of a concession."

Justice Black, with the concurrence of a majority of this Court, further stated:

> "One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, nevertheless allowing the Board to compel agreement when the parties themselves are unable to do so, would violate the fundamental premise on which the Act is based -- private bargaining under Governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."

Another cogent statement contained in the majority opinion appears as follows:

> "It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, and not the Board or other Courts, to decide when and if it is necessary to allow Governmental review of proposals for collective bargaining agreements, and compulsory submission to one side's demands. The present Act does not envision such a process." (Underlining ours).

If a "check-off" is a proper subject of negotiation, under the "terms and conditions of employment" requirement, then it appears to us that certainly a clause relating to the appropriate method of calling a strike, which will certainly affect the "conditions of employment" of all of the employees would fall under that mandatory category. Certainly, it is not precluded.

Professor Harry H. Wellington, professor of Labor Law at Yale University, in his recent publication, "Labor and the Legal Process", stated in connection with the Borg-Warner case as reported in the American Bar Journal (February issue, 1970), page 169:

> "What should collective bargaining cover? The author says that any subject arguably within the statutory language 'wages, hours, and other terms and conditions of employment' should be a mandatory subject for collective bargaining if proposed in good faith, with an exception to protect an employer who is only a third party to the union's objective. He finds the Supreme Court's Borg-Warner rule too restrictive."

More recently and on April 3, 1970, in a session of the Labor Relations Institute conducted at Atlanta, Georgia and sponsored by the Atlanta Lawyers Foundation, Inc., and the Federal Bar Association, John L. Waddleton, Chief Counsel for the Allis-Chalmers Manufacturing Company, in a very erudite lecture posed the very pertinent question involving this very same issue:

> "By what logic, can non-members be precluded from expressing their views?"

He was referring to matters such as this which affected the entire Bargaining Unit and he had specific reference to the Borg-Warner case.

He was complaining of the very same situation about which we are concerned here. The non-members of the Union in the Bargaining Unit have the very same interest involved. They are concerned about their "wages, hours, and conditions of employment". But under a strict interpretation of

the Borg-Warner rule, in the event a strike is suggested, they would have no right to express their views. This is unconscionable.

It is obvious therefore, that the Borg-Warner decision must be reviewed in the light of economic and legal developments during the past twelve years; and in view of the very close 5 to 4 decision, the admonitions and suggestions of Mr. Justice Harlan must be given more and more consideration.

We believe the time is ripe now to re-examine, re-analyze, and review the Borg-Warner decision in the light of present conditions; and we particularly commend the instant case as appropriate for that purpose.

Many years before there was a "Wagner Act" or a "Taft-Hartley Act" or any other Federal act relating to labor, our revered Thomas Jefferson in his Inaugural Address recognized the possibility and even

the probability that there were certain inherent dangers in a strict "Rule of Majority", when he stated in his First Inaugural Address as President of the United States, words to the effect that:

> "A majority can not be permitted to become a tyrant."

That is exactly what the Union is endeavoring to do, and the Board is supporting; that since the Union does have a slight majority in the plant at Central Machine and Tool Company, they can by fiat, control the decision and the time of a strike which would seriously and adversely affect all of the workers in the plant regardless of the wishes, reasons, or desires of the minority.

One of the most vicious aspects of this posture on the part of the Union is that it is not even required to provide the non-union members with the opportunity to state their objections to a strike. They are not even required to consult with the non-union members.

As this Court well knows, it is now deemed a matter of extreme judicial concern that before any decisive action to be taken by any group, society, association, or even a person, without giving the persons who may be adversely affected thereby, a full opportunity to be heard, not only is reprenhensible but in many instances, unlawful.

This Petitioner respectfully submits that all of its employees in the Bargaining Unit have a right to be heard and a right to vote on a proposed strike.

For these reasons, it is respectfully urged that this Petition be granted.

Respectfully submitted,

CENTRAL MACHINE & TOOL COMPANY, INC. OF ENID, OKLAHOMA

By: Frank Carter
FRANK CARTER, ITS ATTORNEY

Dated in Enid, Oklahoma this 3rd day of November, 1970.

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